No. 2177

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

C. M. SUMMERS,
Plaintiff-in-Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF OF PLAINTIFF IN ERROR IN SUPPORT OF PETITION FOR RE-HEARING.

LEWIS P. SHACKLEFORD,
Attorney for Petitioner.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH JUDICIAL CIRCUIT.

C. M. Summers,
Plaintiff-in-Error,

against

United States of America,
Defendant-in-Error.

Brief Supporting Petition for Rehearing.

As attorney for the petitioner herein, the writer of this brief feels that a serious responsibility rests upon him for the conduct of this case, which has apparently ended in a final judgment against the petitioner whereby he is sentenced to five years imprisonment without having had any trial whatever in the premises.

It was upon advice of the writer of this brief that the defendant herein refused to plead and stood upon his demurrer. It was upon the rulings of this court in several cases involving identically the same principle involved in this case particularly the ruling in this court in the case of *Corbus* v. *Leonhardt,* 114, Federal (page 10), that the writer assumed the responsibility of advising the defendant to stand upon his demurrer.

In the opinion rendered on the 3rd of February, 1913, in this case, this court reverts to the case of *Page* v. *Burnstein,* 102 U. S. (page 664) as an authority sustaining the present ruling of this court. In the case of

Corbus v. *Leonhardt*, 114 Federal (page 10), the case of *Page* v. *Burnstein* was said by this court to have no application to Alaska.

In the brief of the United States Attorney filed in this court, at page 73, the United States Attorney used the following language:

> "The conflict of the *Page* case with that of *Corbus* v. *Leonhardt* is irreconcilable and manifest."

The use of *Page* v. *Burnstein* in this case as an authority in support of the conclusions reached by this court must, without question, constitute a disproval of the case of *Corbus* v. *Leonhardt,* although the case of *Corbus* v. *Leonhardt* had been deliberately and maturely considered many years after the decision of the Supreme Court of the case of *Page* v. *Burnstein.*

If the petitioner in this case, then, is to suffer imprisonment without trial, it is due in a very large extent to the assurance which the writer of this brief felt that this court would not reverse its own previous decisions. There are two questions involved in this case. The First, which was not discussed in the opinion of this court, is the question as to whether a judgment in a criminal case for anything other than a petty offense can be sustained unless the record shows that the defendant was tried by a jury, and further that, even where a jury trial is waived, in law a jury trial cannot be waived in a criminal case.

The Second: Does section 1024 have application as a statute of procedure in the Territory of Alaska:

Before discussing the questions a few preliminary remarks are necessary. It must be remembered that when the indictment in this case was returned, with one possible exception this was the first indictment returned in Alaska in which more than one offense had been charged and naturally counsel for the defendant in this case, in view of the ruling of this court in *Corbus* v. *Leonhardt* looked upon the effort of the district attorney as an

attempt to prejudice the defendant without authority of law or precedent, by heaping upon him in one case fifty-six separate charges. The last offense in point of time charged in the indictment occurred in the month of June, 1911, and the other offenses charged dated back from month to month for a period of three years.

The case was pending in the lower court only four months after the indictment was found and was then removed to this court. It was argued and submitted at the next session after the judgment of the lower court had been entered. A reversal of the case would not have meant defeat to the district attorney, as only one year had elapsed between the time of the finding of the indictment and the time this court filed its opinion affirming the proceedings in the lower court, so that the government would not even now be seriously injured if the demurrer had been sustained, provided they had a meritorius case to submit to the next grand jury. More than half the charges laid are still unbarred by the Statute of Limitations so that there is nothing in the claim of the Government that a favorable ruling to the United States is necessary to the accomplishment of substantial justice. The charge was made by the district attorney in his brief upon the writ of error in this case, that the defendant had no right to claim his constitutional privilege of jury trial for the reason that he and his attorney had waived the right to jury trial and an effort was made to censure the writer of this petition for raising the question in the Appellate Court.

In the case of *Schick* v. *United States,* an effort was made by attorneys for the government and by attorneys for the defendant to suppress the question of the right to jury trial, an express written stipulation having been made by the parties waiving a jury, and the Supreme Court of the United States in that case, 195 U. S. (page 67), used the following language:

> "In each case the parties in writing waived a jury, and agreed to submit the issues to the court.
> * * *

> The waiver of a jury was not assigned as error, nor referred to by counsel at the hearing before us, either in brief or argument. The question of its effect was suggested by this court and briefs called for from the respective parties.''

Several of the cases hereinafter cited are cases where a specific written stipulation was made between the parties waiving their right to jury trial and the courts have uniformly held that they must nevertheless entertain the question as to whether such proceeding is within the jurisdiction of the court, and the uniform holding has been that a written stipulation even can have no effect upon the right of the defendant to a jury and that the judgments involved are void in criminal cases. This is a right which the courts universally recognize.

In view of the fact that the writer of this brief advised the petitioner in this case to refuse to plead and stand upon his demurrer, and that the petitioner in this case has been deprived of his right to jury trial, not of his own volition but on account of the advice which counsel had given, based upon the case of *Corbus* v. *Leonhardt* and the other cases cited therein, we feel no hesitancy in discussing the question previously discussed on page 73 of the brief of plaintiff-in-error under the head of ''Third Specification of Error.''

First Point.

The record in this case affirmatively shows that the defendant was charged with a serious crime, that he has never pled guilty thereto, and that he has been convicted without trial. The opinion of this court shows that this question has not been considered or discussed in reaching the conclusion announced in the opinion of February 3rd, 1913.

Upon this question the following is the state of the law in the Supreme Court of the United States:

In the case of *Callan* v. *Wilson,* 127 U. S. (page 540), the defendant was charged with the crime of conspiracy in the police court of the District of Columbia and convicted by the judgment of that court without a jury and sentenced to a fine of $25. The defendant appealed his case and then defaulted in the payment of his fine and withdrew the appeal, went to jail and sued out a writ of habeas corpus against the United States Marshall for the District of Columbia. It was held that the offense with which he was charged was a crime and that the judgment of the lower court was void, not having been supported by the verdict of a jury and the Supreme Court ordered the discharge of the appellant from custody.

One of the most recent cases upon the question of the right to jury trial is the case of *Schick* v. *United States,* 195 U. S., and we find in the opinion of the court at page 70, the language of *Callan* v. *Wilson* quoted with approval. The following is the language:

> "Except in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, a guarantee of an impartial jury to the accused in a criminal prosecution or by or under the authority of the United States secures to him the right to enjoy that mode

> of trial from the first moment and in whatever court he is put on trial, for the offense charged."

In the case of *Schick* v. *United States* above cited, the Supreme Court of the United States held that in a prosecution under section 11 of the oleomargarine act, which reads as follows: ("That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law, shall be liable to a penalty of $50 for each such *offense.*") The defendant was really not charged with a crime but with a petty *offense;* therefore, under the ruling in the case of *Callan* v. *Wilson, supra,* a jury may be waived. Mr. Justice Brewer in his opinion further discusses the provisions of the Constitution with reference to jury trial and demonstrates that the original draft of the Constitution as reported to the convention, provided as follows:

> "The trial of all criminal *offenses* shall be by jury,"

and shows that by unanimous vote the draft of the constitution was amended so as to read "The trial of all *crimes,*" and under the peculiar circumstances of that case, which simply involved the payment of a fine of $50, it was held that the defendants were charged with a petty offense only.

It is unnecessary to discuss at length the case of *Rasmusson* v. *United States,* 197 U. S. (page 516), with which this court must be familiar. It is sufficient to say the Act of Congress providing a criminal code for Alaska was declared unconstitutional insofar as it reduced the number of jurors required for the trial of a misdemeanor, from twelve to six.

The decision in the Case of *Thompson* v. *Utah,* 170 U. S. (page 343), is determinative of the question involved in this case.

While we ask an examination of all these authorities, we take the liberty of quoting the following language from the opinion:

> "It is said that the accused did not object until after verdict to trial by jury composed of eight persons; therefore he should not be heard to say that his trial by such jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of accused felon, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt."

We especially ask the court to read in this connection also the case of *Cancemi* v. *People,* 18 N. Y. (page 131). In this case one of the twelve jurors was withdrawn upon the express consent and stipulation of the prisoner and he was tried by eleven jurors. Among other things, in discussing the case, the court said the following:

> "If the deficiency of one juror may be waived there appears to be no good reason why a deficiency of eleven might not be and it is difficult to see why the entire panel might not be dispensed with and the trial committed to the court alone."

In discussing the early English cases, the court used the following language:

> "The opinion of the judges in the court of the King's Bench in the case of Lord Dacres, tried in the reign of Henry VIII for treason strongly fortified the conclusion above expressed. One question in the case was whether a prisoner might waive a trial by his peers and be tried by the country, and the judges agreed that he could not, for the statute of Magna Charta was in the negative and prosecution was at the King's suit. Woodeson in his lectures (Vol. 1, page 346) says the same question was resolved on the arraignment of Lord Audley in the seventh year of the reign of Charles I, and that the reason was that the mode of trial was not so broadly

> a privilege of the nobility as a part of the law of the land, like the trial of commoners by commoners enacted or rather declared by Magna Charta. In 3 Inst. 30 the doctrine is stated that 'a nobleman cannot waive his trial by his peers and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is that he must be tried *per pares,*' and so it was resolved in Lord Dacres' case."

A lengthy brief, citing the cases in which the question now being discussed is involved, is unnecessary, for the reason that the matter is thoroughly digested in a most exhaustive footnote to the case of Re *McQuown,* found in the 11th L. R. A., new series, at page 1136. The following is the statement of the digester.

> "Although the contrary has been asserted many times, yet, when confined to cases involving the waiver, by one charged with a crime, of a trial by jury, as distinguished from other questions, such as consenting to trial by a less number of jurors than provided by the constitution, the waiver of the disqualification of certain jurors and the like, *the proposition may be safely asserted that the courts are unanimous in holding that, as to felonies, in the absence of statutory authority, a defendant cannot waive a jury trial and an attempt to do so followed by a trial before the court without a jury will be of no avail, and a judgment rendered by the court will be erroneous if not void."*

In the note above quoted are collected all of these cases bearing upon the subject. In our reply brief on file herein at p. 3 the decision of the Circuit Court of Appeals for the First Circuit in the case of *Kelleher* v. *United States,* 193 Fed. 8, is cited and extensively quoted. That authority settles without question the proposition that a violation of the National Banking Act with which defendant in this case is charged is a felony, since the passage of the penal code act of March 4, 1909, 35 Statutes at Large, p. 1088.

We respectfully submit that in view of the fact that the questions involved in this case must arise now or later; upon Habeas Corpus as in *Callan* versus *Wilson,* that this cause be set down for reargument and that not less than two hours on a side be allowed for presentation or that questions involved herein be certified by this court to the Supreme Court.

Second Point.

Section 1024 of the Revised Statutes of the United States has no application to the territories. General Statutes of Procedure found in the Revised Statutes of the United States were not intended to apply to the territories and it is presumed that they do not apply to the territorial courts unless a specific intention to the contrary is expressed in the Statute.

We respectfully submit that the opinion of this court shows that it is doubtful whether 1024 applied to the territories but that the position taken by this court in its opinion is that it cannot be said that 1024 *did not apply to the territories.* That is to say in discussing the case the burden was thrown on the plaintiff-in-error to show conclusively that 1024 did not apply to the territories. We believe the rule to be that general statutes of procedure passed by Congress without specifically mentioning the territories must be presumed to apply only to United States Circuit and District Courts and not to territorial courts. This was the question discussed in the case of *Clinton* v. *Englebrecht,* 80 U. S., p. 434, wherein the court used the following language:

> "The regulations of that act (referring to the Judiciary Act) requiring the selection of jurors had no reference whatever to the territories. They were framed in reference to the states and cannot without violation of the rules of construction be made to apply to the territories of the United States. *If, then,* this subject was not regulated by territorial law it would be difficult to say that the selection of jurors had been provided for at all in the territories."

In the case of *Good* v. *Martin,* 95 U. S., at p. 90, the Supreme Court of the United States used the following language:

> "Territorial courts are not courts of the United States within the meaning of the Constitution as

> appears by all the authorities: '*Clinton et al.* v. *Englebrecht,* 13 Wall. 434, *Hornbuckle* v. *Toombs,* 18 Wall. 648.' A witness in civil cases cannot be excluded in Courts of the United States *because* he or she is a party to or interested in the issue tried; but this provision has no application in the Courts of a Territory where a different rule prevails."

We take the liberty of asking this court, by comparing Section 1024 which is under discussion in this case with Section 858 which was under discussion in the case of *Good* v. *Martin,* and *Corbus* v. *Leonhardt,* what distinction can this court point out showing an intention to limit the application of 858 on the part of Congress to a narrower application than that which would be attributed to Section 1024; the only answer that can be made by this court to this question is that Section 858 specifically referred to "Courts of the United States," and that Section 1024 did not refer to any particular courts, but simply established a rule of procedure. This court cannot make such an answer to the following question:

> "How can the case of *Thiede* v. *Utah,* 159 U. S., p. 510, be distinguished from the case at bar?"

In the Thiede case last cited the courts were dealing with the application of Section 1033 of the Revised Statutes. Section 1033 does not refer to courts of the United States or to any court but simply provides a rule of procedure in capital and treason cases. It (*Section 1033*) *is more general in its application, and more general in its scope of language than Section 1024.* In discussing the Thiede case the Supreme Court of the United States used the following language:

> "By 1033 Revised Statutes the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial. *Logan* v. *United States,* 144 U. S., 263. But this section applies to Circuit and District

> Courts of the United States and does not control the practice and procedure of the courts of Utah which are regulated by the statutes of that territory. This question was fully considered in *Hornbuckle* v. *Toombs,* 18 Wall. 648, and it was held, overruling prior decisions, that the pleadings and procedure of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of territorial assemblies and the regulations which might be adopted by the courts themselves. See also *Clinton* v. *Englebrecht,* 13 Wall, 434, in which it was held that the selection of jurors in the territorial court was to be made in conformity to the territorial statutes; *Good* v. *Martin,* 95 U. S., 90, in which a later ruling was made as to the competency of witnesses against *Reynolds* v. *United States,* 98 U. S., 145, where the same rule was applied to the impanelling of grand jurors and the number of jurors. Also *Miles* v. *United States,* 103 U. S., 304, a case coming from the Territory of Utah, in which the same doctrine was applied in regard to the mode of challenging petit jurors."

The reason we say above that 1033 is more general in its scope than 1024 is this, 1024 was passed under a title and preamble that showed an intention to have 1024 apply only to United States Circuit and District Courts *in the several states* and that subsequent legislation showed that the act which contained 1024 in so far as fee provisions were concerned was extended only to certain territories *named* in subsequent legislation of Congress. It is admitted in the opinion of this court that the territories named were not all the territories then in existence. It also appears that in Alaska so far as District Attorneys were concerned the fee system never applied, the district attorneys were on salary. (Act May 17th, 1884 30 Stat. L., pp. 25-27, Sec. 9). "They shall receive respectively the following annual salaries. The Governor, the sum of three thousand dollars, the attorney, the sum of two thousand five hundred dollars."

The statute from which Section 1033 was drawn is found at page 112, Volume 1 of the Statutes at Large, entitled as follows:

> "Chapter 9. An act for the punishment of certain crimes against the United States."

The first section denounces the levying of war against the United States by persons owing allegiance thereto. The second section refers to the same subject. The third section reads as follows:

> "And be it further enacted that if any person or persons shall within any fort, dock-yard, magazine, or in any other place or district or country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death."

This is the very section under which Fitzpatrick was successfully prosecuted for murder in the case of *Fitzpatrick* v. *United States,* 178 U. S., page 304, the murder having been committed in the District of Alaska and the Supreme Court holding that the procedure was controlled by the Oregon statute although the murderer was punishable under the act just quoted. Sections 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 denounced the crimes of misprison of felony, of manslaughter, piracy, maiming, forgery, stealing, larceny, receiving stolen goods, perjury, bribery, obstruction of process, rescue of convicted persons and like crimes. None of these crimes are limited in their application to the territorial limits of the states and without doubt apply to the territories. *Section 29 of this act is the section that is now Section 1033 of the Revised Statutes which was discussed in the Thiede case and held inapplicable to the territories.* We have been unable to find in the act any expression limiting the provisions of the act to proceedings in the United States Circuit and District Courts. Nevertheless the Supreme Court of the

United States held that in the Section which concerned procedure the act must be considered as having been intended to furnish a rule of procedure for United States Circuit and District Courts in the states only as distinguished from courts of the territories. How then can this court hold Section 1024 to apply to the territory without disregarding the entire process of reasoning applied in the case of *Thiede* v. *Utah*. It seems to us that this is a parallel and deserves the most serious consideration if the doctrine of *stare decis* has any real sanctity. We respectfully request the court to examine the act construed in the Thiede case and found as above cited, page 112, Volume 1 of the United States Statutes at Large.

We feel sure that a reconsideration of the present case can lead to nothing but the best results. The case was argued briefly and the argument did not develop fully the basic principle involved in all of the rulings of the Supreme Court cited by the plaintiff-in-error, namely, that the statutes of procedure of the United States are not really in conflict with the statutes adopted for the territories, because, while they may set up a different procedure, they are intended to apply to different courts. An examination of all the cases last cited and all of the cases heretofore decided in the Circuit Court of Appeals for the Ninth Circuit will show without question that the real reason assigned in each instance was that the general statutes of procedure in the United States were intended to regulate forums other than the territorial courts; if Section 1024 is to be considered not as a special statute intended to apply to territorial courts but as an ordinary statute of procedure then it would be considered to apply only to United States Circuit and District Courts.

There is, however, another matter which was not discussed in the opinion of this court and which, perhaps, was not sufficiently discussed in the brief of the petitioner when the case was submitted, namely, the act of

Congress approved March 4, 1909, known as the new Penal Code, 35 Statutes at Large, p. 1088. In view of the seriousness and importance of this case we take the liberty of copying Chapter 13 of that act:

"CHAPTER THIRTEEN.

CERTAIN OFFENSES IN THE TERRITORIES.

SECTION 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any territory or District, or within or upon any place within the exclusive jurisdiction of the United States.

SECTION 312. Whoever shall sell, lend, give away, or in any manner exhibit, or offer to sell, lend, give away, or in any manner exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession for any such purpose, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles above mentioned can be purchased or obtained, or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than two thousand dollars, or imprisoned not more than five years or both.

SEC. 313. Every person who has a husband or wife living, who marries another, whether married or single, and any man who simultaneously, or on the same day, marries more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose hus-

band or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract.

SECTION 314. If any male person cohabits with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

SEC. 315. COUNTS FOR ANY OR ALL OF THE OFFENSES NAMED IN THE TWO SECTIONS LAST PRECEDING MAY BE JOINED IN THE SAME INFORMATION OR INDICTMENT."

Can it be said that the paragraph above referred to which permits the joinder of counts in an indictment only of certain specified offenses in the territory does not impliedly prohibit the joinder of any other offenses? Can it be said that the section of the statute referred to italicized above has absolutely no meaning whatever?

At the risk of being tedious and in view of the importance of this case, we desire to ask the court to again read the reply brief, on file herein, from pages 4 to 10, and particularly to read again the Act of Congress of July 22, 1813, copied at page 7. All through the title "Judiciary" of the Revised Statutes of the United States will be found sections relating to procedure where the courts of the territories are mentioned and application is given by specific reference to the courts of the territories. Must it not then be assumed that any statute of the United States concerning procedure has by custom been understood to apply to the courts of the territories only when the courts of the territories are named in the statute?

The writer of this brief feels a very serious responsibility for the manner in which this case has been conducted in the court below. The responsibility is partly

chargeable to the writer of the brief but in view of all of the authorities above submitted I desire to say that it would be an unconscionable thing, no matter how an attorney may have mismanaged a criminal case, for a court to sustain a sentence wherein the defendant has had no testimony adduced against him. I believe that this court in considering this petition for re-hearing must feel a very grave responsibility, and must feel that questions of the greatest importance are involved in the case which, for the sake of expedition, justice and more thorough consideration, should be reargued.

Very respectfully submitted,

LEWIS P. SHACKLEFORD,
Attorney for Petitioner.